

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CARLOS VARGAS,	:	
Petitioner,	:	
	:	
v.	:	C.A. No. 02-456 ML
	:	
IMMIGRATION AND NATURALIZATION	:	
SERVICE, ¹	:	
Respondent.	:	

REPORT AND RECOMMENDATION

David L. Martin, United States Magistrate Judge

Carlos Vargas ("Petitioner"), proceeding pro se, seeks to have this court order the Immigration and Naturalization Service ("INS" or "Respondent") to resolve his status in this country. He filed a Petition for Writ of Habeas Corpus for Entry of Order Directing Immediate Solution to Petitioner's Immigration Status (the "Petition") on October 21, 2002.² The INS responded on November 15, 2002, by filing Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus ("Motion to Dismiss"). The Motion to Dismiss has been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and Local R. 32(c). A

¹ Petitioner Carlos Vargas ("Petitioner") named the "United States" as the respondent in the Petition for Writ of Habeas Corpus for Entry of Order Directing Immediate Solution to Petitioner's Immigration Status (the "Petition"). The court, in ordering the Government to respond to the Petition, substituted the Immigration and Naturalization Service ("INS") as the named respondent. See Order of 10/24/02 directing Government to file response (Lisi, J).

² The Petition was initially received in the Clerk's Office on October 1, 2002, but rejected because it was not accompanied by the \$5.00 filing fee, see 28 U.S.C. § 1914, or a motion for leave to proceed in forma pauperis. Petitioner resubmitted the Petition on October 21, 2002, accompanied by the filing fee.

hearing was held on January 22, 2003, with Petitioner participating in the hearing via telephone from the Adult Correctional Institutions ("ACI") in Cranston, Rhode Island, the place of his present detention. For the reasons explained below, I recommend that the Motion to Dismiss be granted.

Facts and Travel

Petitioner is thirty-three years of age and a native and citizen of Guatemala. See Respondent's Memorandum in Support of Motion to Dismiss Petition for Writ of Habeas Corpus ("Respondent's Mem.") at 2. On January 7, 2002, he pled nolo contendere to two counts of second degree child molestation in the Providence County Superior Court. See id. He was sentenced to ten years imprisonment of which eighteen months were to be served and the balance suspended. See id. His projected release date is allegedly July 31, 2003. See Petition at 1.

Petitioner alleges that "[o]n July 24, 2002, the Rhode Island Parole Board granted Petitioner's release to his Immigration detainer" Id. at 1 (citing Exhibit ("Ex.") A (Parole Notice)). At the January 22, 2003, hearing, counsel for the INS reported that Petitioner had passed from state custody into the custody of the INS on January 16, 2003. This apparently was the result of Petitioner being paroled by the state authorities. Counsel further reported that Petitioner was served on January 16th with a Notice to Appear ("Notice") before an immigration judge in Oakdale, Louisiana, at a date and time to be set.³ The INS alleges in the Notice that

³ The Notice to Appear ("Notice") states in pertinent part:

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at: Executive Officer for Immigration Review P.O. Box 750 Oakdale, LOUISIANA 71463

Petitioner is subject to removal from the United States because he entered the United States illegally and because he is an alien who has been convicted of crimes involving moral turpitude. See Notice at 3 (citing Sections 212(a)(6)(A)(i) and 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, codified at 8 U.S.C. § 1182(a) (6)(A)(i) and 8 U.S.C. § 212(a)(2)(A)(i)(I) (2000)). As to the first ground, the Notice specifically alleges that Petitioner arrived in the United States at or near an unknown place on or about May 1, 1988, and that he was not admitted or paroled after inspection by an Immigration Officer. See Notice at 3. Regarding the second ground, the Notice alleges that on January 7, 2002, Petitioner was convicted of second degree child molestation and that he received a ten year sentence. See id.

Discussion

The INS urges that the Petition be dismissed on the ground that Petitioner was not in federal custody at the time the Petition was filed. In support of this argument,⁴ the INS cites the holding of the United States Supreme Court in

on a date to be set at a time to be set to show why you should not be removed from the United States based on the charge(s) set forth above.

Notice at 1 (underlined words printed in blank spaces of form). At the hearing on January 22, 2003, Petitioner denied receiving a copy of the Notice. The court, therefore, directed that a copy of the Notice be mailed to Petitioner, and the Clerk has done so.

⁴ Counsel for the INS made this argument orally at the hearing on January 22, 2002. The INS argued initially in its memorandum that Petitioner was in the custody of the ACI and not the federal government, see Respondent's Memorandum in Support of Motion to Dismiss Petition for Writ of Habeas Corpus ("Respondent's Mem.") at 2, 4-5, and that the Petition should be dismissed on that basis, see id. at 2, 5. However, as a result of Petitioner passing into federal custody on January 16, 2003, the INS adjusted its argument at the hearing to take into account this changed circumstance.

Carafas v. LaVallee, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968), that "[t]he federal habeas corpus statute requires that the applicant must be 'in custody' when the application for habeas corpus is filed." Id. at 238, 88 S.Ct. at 1560. The Courts of Appeals of the Sixth, Eighth, Ninth, and Eleventh Circuits have held that an INS detainer does not satisfy the in custody requirement. See Campos v. INS, 62 F.3d 311, 314 (9th Cir. 1995)("[T]he bare detainer letter alone does not sufficiently place an alien in INS custody to make habeas corpus available.")(internal quotation marks omitted); Prieto v. Gluch, 913 F.2d 1159, 1162-63 (6th Cir. 1990)(finding that federal prisoner against whom INS detainer had been lodged was not in INS custody and therefore there could be no jurisdiction over prisoner's claims against INS); Orozco v. United States INS, 911 F.2d 539, 541 (11th Cir. 1990)("The filing of the detainer, standing alone, did not cause [the petitioner] to come within the custody of the INS."); Campillo v. Sullivan, 853 F.2d 593, 595 (8th Cir. 1988)("The filing of an INS detainer, standing alone, does not cause a sentenced offender to come within the custody of the INS for purposes of a petition for a writ of habeas corpus.").

This court agrees with the INS that Petitioner was not in the custody of the INS when the Petition was filed. If that circumstance remained true today, the court would recommend dismissal solely on that ground. However, as Petitioner is now in INS custody, doing so would be shortsighted because Petitioner can cure the defect merely by refiling the Petition. Accordingly, the court addresses another ground for dismissal which now exists.

At the hearing, Petitioner stated that the relief which he seeks is for the court to order an immigration judge to

conduct a hearing to determine his status. The Notice which counsel for the INS presented to the court is evidence that the INS has initiated steps to provide the hearing which Petitioner seeks. Petitioner has been in the custody of the INS for only a brief period, and it would be highly inappropriate for this court to interfere with the scheduling of those proceedings. Cf. INS v. Aguirre-Aguirre, 526 U.S. 415, 425, 119 S.Ct. 1439, 1445, 143 L.Ed.2d 590 (1999)(recognizing "that judicial deference to the Executive Branch is especially appropriate in the immigration context"). The court also notes that the facts which form the basis for the INS's contention that Petitioner is subject to removal do not appear to be in dispute.

Accordingly, this court recommends that the Motion to Dismiss be granted because Petitioner was not in the custody of the INS when the Petition was filed and also because the INS has taken steps to give Petitioner the hearing he seeks.

Conclusion

For the reasons explained above, I recommend that the Motion to Dismiss be granted. Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of the Court within ten (10) days of its receipt. See Fed. R. Crim. P. 72(b); D.R.I. Local R. 32. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

DAVID L. MARTIN
United States Magistrate Judge
January 23, 2003